## INDEX

Subject index, table of contents, cases cited and constitutional and statutory provisions cited.


| | Page |
|---|---|
| Petition for writ of certiorari | 1-10 |
| Petition for writ of certiorari (beginning) | 1- 3 |
| Statement of facts | 4- 5 |
| Contentions of your petitioners | 6 |
| Reasons why writ of certiorari should be granted | 6 |
| Brief of Petitioners | 11-30 |
| Question involved | 11-14 |
| Constitutional provisions and statutes of the State of Wyoming involved in this action | 12-13 |
| Statement of facts | 14 |
| Specifications of error | 14-15 |
| Argument | 15-29 |
| Conclusion | 30 |
| Appendix | 31-32 |


### Table of Contents and Authorities Cited


Arkansas State Highway Comm. v. Nelson Bros., 87 S. W. (2d) 394 ..... 18

Cargile v. New York Trust Co., 67 Fed. (2d) 585 ..... 7, 23

Constitution of Wyoming
- Article VIII, Sec. 1 ..... 12, 31
- Article VIII, Sec. 2 ..... 4, 12, 31
- Article VIII, Sec. 4 ..... 4, 12, 31

Ex parte Ayers, 123 U. S. 443 ..... 6, 16, 18

Fidelity and Deposit Co. v. Trustees of University, 16 Fed. (2) 150 ..... 24

Hagood v. Southern, 117 U. S. 52 ..... 6, 16, 22

Hamp v. State, 19 Wyo. 377, 118 Pac. 653 ..... 29

Hjorth Royalty Co. v. Trustees of University, 30 Wyo. 309, 222 Pac. 9 ..... 8, 16, 18, 25, 26

Hopkins v. Clemson Agricultural College, 221 U. S. 641 ..... 15, 16, 18

Page

Irrigation & Power Co. v. Grant, 44 Wyo. 392, 13 Pac. (2d) 235 ..... 28

Louisiana v. Jumel, 107 U. S. 711 ..... 16, 21, 22

Parshall v. Cowper, 22 Wyo. 385, 143 Pac. 302 ..... 29

Read, Ins. Commr. v. National Equity Life Insurance Co., 114 Fed. (2d) 977 ..... 8, 16, 19, 20, 21

Revised Statutes of Wyoming, 1931:
Chap. 26, Sec. 2, Session Laws of Wyoming, 1933 (Special Session), amending Section 122-302, Revised Statutes of Wyoming, 1931 ..... 5, 12, 13, 31-32
Section 122-203 ..... 13, 32

Ryan v. Tutty, 13 Wyo. 122, 78 Pac. 661 ..... 27, 28

Smith v. Reeves, 178 U. S. 436 ..... 16, 17

State Highway Comm. in Ark. v. Kansas City Bridge Co., 81 F. (2d) 689 ..... 7, 23

State v. Mitchell Irrig. Co., 262 N. W. 543 ..... 26, 27

Utah Construction Co. v. State Highway Commission, 16 Fed. (2d) 322 (Dist. Ct.) ..... 25

Utah Construction Co. v. State Highway Commission, 278 U. S. 194 ..... 6, 17

Worchester County Trust Co. v. Riley, 302 U. S. 292 ..... 7, 19, 20

# In the
# Supreme Court of the United States

**October Term, 1940**

**No.** .....

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SEYMOUR S. SHARP, Superintendent of Water Division No. 1, State of Wyoming, and JOHN A. WHITING, JR., Water Commissioner, District No. 14, Division No. 1, of the State of Wyoming,

*Petitioners,*

*vs.*

THE MITCHELL IRRIGATION DISTRICT, a corporation,

*Respondent.*

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**PETITION FOR WRIT OF CERTIORARI**

*To the Honorable, The Chief Justice, and Associate Justices of the Supreme Court of the United States:*

The petition of Seymour S. Sharp and John A. Whiting, Jr., respectfully shows:

I.

That on July 31, 1940, the Mitchell Irrigation District filed in the United States District Court for the District of Wyoming its complaint against Seymour S. Sharp and John A. Whiting, Jr.; said complaint prayed for the issuance of a writ of injunction, provisional as well as perma-

nent, against your petitioners; and further prayed that said petitioners, and each of them, and their successors in office, and all persons claiming to act under their authority, be perpetually enjoined from permitting diversions and taking of water from the natural channel of the North Platte River, an interstate stream, into the headgates and diversion works of canals located above the point of diversion of the Mitchell Irrigation District's canal, except in strict order of priority at all times when the available flow is not sufficient to supply the needs of plaintiff district with the amount of its appropriation; and further prayed that petitioners, their successors in office and all persons claiming to act under their authority, be required to regulate and close, or partially close, headgates in times of insufficient water to supply all appropriations dependent thereon, so that the available supply may be taken by said appropriators in strict order of priority; respondent further prayed a temporary mandatory injunction issue during the pendency of the suit against petitioners, commanding them to divide, regulate and control the diversions and taking of water of the North Platte River so that the same may be available for diversion and use by the appropriators entitled thereto in strict order of priority. (R. pp. 3-10)

II.

In said action the jurisdiction of the Federal court was based upon the alleged diversity of citizenship, concerning which the complaint contained the following allegations:

> "1. That plaintiff is a foreign corporation organized and existing under the laws of the State of Nebraska, with its principal office and place of business in the Town of Mitchell, Scotts Bluff County,

Nebraska and is a citizen of the State of Nebraska and is an irrigation district comprising approximately 14,000 acres of land situate in Scotts Bluff County, State of Nebraska; that the defendants are residents and citizens of the State of Wyoming; that the amount in controversy in this suit exceeds the sum of Three Thousand Dollars ($3,000.00), exclusive of interest and costs." (R. p. 3)

III.

Your petitioners challenged the jurisdiction of the District Court by a motion to dismiss (R. p. 10) on the ground that the suit was in reality a suit against the State of Wyoming by a citizen and resident of the State of Nebraska, and that, therefore, under the Federal Constitution and statutes, the Federal courts were without jurisdiction. The District Court sustained the motion to dismiss on the ground that it was without jurisdiction for the reason the suit was in reality a suit against the State of Wyoming, and thereupon entered an order sustaining petitioners' motion to dismiss. (R. p. 11) Nunc pro tunc order dismissing cause of action. (R. p. 14)

The decision of the District Court was not officially published in the Federal Reporter system.

IV.

In due time the respondent appealed the case to the Circuit Court of Appeals of the Tenth Circuit, which, in an opinion, reversed the decision of the District Court and held that the action against petitioners was not a suit against the State of Wyoming and remanded said cause to the District Court with direction to deny the motion to dismiss. Said decision having been rendered by said Circuit Court on July 18, 1941. A copy of said decision may be found at (R. pp. 15-22).

## STATEMENT OF FACTS

Your petitioners respectfully show that the facts upon which it bases its claim that this action is an action against the State of Wyoming and, therefore, is not within the jurisdiction of the Federal courts are as follows:

I.

That petitioner, Seymour S. Sharp, Superintendent of Water Division No. 1, State of Wyoming, is a constitutional officer under the provisions of Article VIII, Section 2, and Article VIII, Section 4, Wyoming Constitution, which are as follows:

> Article VIII, Sec. 2, Constitution of Wyoming:
>
> "There shall be constituted a board of control, to be composed of the state engineer and *superintendents* of the water divisions; which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the state and of their appropriation, distribution and diversion, and of the various officers connected therewith. Its decisions to be subject to review by the courts of the state."
>
> Article VIII, Sec. 4, Constitution of Wyoming:
>
> "The legislature shall by law divide the state into four (4) water divisions, and provide for the appointment of *superintendents* thereof."

Petitioner Sharp is a constitutional official, through whom the State acts in the administration of the waters within the boundaries of the State.

In this action petitioner Sharp was sued in his official capacity as a constitutional officer.

II.

That petitioner, John A. Whiting, Jr., Water Commissioner of District No. 14, Division No. 1, of the State of Wyoming, is a State official appointed pursuant to the provisions of Chapter 26, Section 2, Session Laws of Wyoming, 1933 (Special Session), amending Section 122-302, Revised Statutes of Wyoming, 1931, and is one of the State officers through whom the State acts in the administration of the waters within the boundaries of the State; said section authorizing his appointment being as follows:

> "The governor shall appoint one *water commissioner* for each water district, who shall be selected from persons recommended by the *superintendent* of the water division in which such water district is situated with the advice and approval of the Board of County Commissioners of the county or counties, lying wholly or partly within such water district. Each *commissioner* shall hold his office until his successor is appointed and shall have qualified, and the governor shall, by like selection and appointment, fill all vacancies which shall occur in the office of *water commissioners,* and may, at any time, remove any *water commissioner* for failure to perform his duties as such *water commissioner.*"

III.

It is the duty of said petitioners, and each of them, under the Constitution and laws of the State of Wyoming, to supervise and administer the waters of the State; execute the laws relative to the distribution of water in accordance with rights of priority of appropriation and to regulate and control the storage and use of water under all permits approved by the State Engineer regardless of whether or not the said rights have been adjudicated.

**CONTENTIONS OF YOUR PETITIONERS**

It was the contention of your petitioners in the lower court, and it is their contention in this Court, that although your petitioners are named as party-defendants in said action the State of Wyoming is the real party to this controversy, and that the petitioners are merely an arm or agency through whom the State of Wyoming acts in the supervision and administration of the waters of the State, and that any action against said petitioners in their official capacity is in fact an action against the State of Wyoming.

**REASONS WHY WRIT OF CERTIORARI SHOULD BE GRANTED**

Your petitioners are advised, and so believe, that under the facts and the law of this case the decision of the Circuit Court of Appeals for the Tenth Circuit, reversing the order of dismissal for want of jurisdiction and holding that this suit is not a suit against the State of Wyoming, is erroneous and in violation of the rules, decisions and principles of law as laid down by this Honorable Court, and that this Honorable Court should require said cause to be certified to it for its review and determination under and in accordance with the provisions of the Acts of Congress in such cases made and provided, for the following reasons:

I.

Because the decision of said Circuit Court of Appeals of the Tenth Circuit is in direct conflict with the holdings and decisions of this Honorable Court in the case of Hagood v. Southern, 117 U. S. 52; Ex parte Ayers, 123 U. S. 443; Smith v. Reeves, 178 U. S. 436; Murray v. Distilling Company, 213 U. S. 151; Utah Construction

Co. v. Highway Commission of Wyoming, 278 U. S. 194; Worchester County Trust Co. v. Riley, 302 U. S. 292, and other cases cited in petitioners' brief filed herewith, each and all of which said cases hold that the court must look through form to substance in an action brought against state officers or state agencies to determine whether or not the state is the real party-defendant, even where the State is not actually named as a party to the record and that if, upon investigation, it appears that the action is in reality an action against a sovereign state then the Federal courts are without jurisdiction, save and except in those special cases where Federal questions are involved.

II.

Because the decision of the Circuit Court of Appeals of the Tenth Circuit in the case at bar is in direct conflict with the decisions of other circuit courts of appeal on the same matter, viz.: State Highway Commission in Arkansas, et al. v. Kansas City Bridge Co., 81 Fed. (2d) 689 (8th Circuit); Cargile v. New York Trust Co., 67 Fed. (2d) 585 (8th Circuit); Read, Insurance Commissioner, v. National Equity Life Insurance Co., 114 Fed. (2d) 977 (10th Circuit), and other cases cited in petitioners' brief filed herewith.

III.

Because said Circuit Court of Appeals of the Tenth Circuit in its decision refused to give any force or effect to the constitutional provisions of this State and of the statutes passed by the Wyoming legislature.

IV.

Because the decision of the Circuit Court of Appeals of the Tenth Circuit purports to be based upon certain

decisions of this Honorable Court, which said decisions hold to the contrary to the interpretation placed upon them by said court.

V.

Because the decision of said Circuit Court of Appeals decides an important question of local law, a question in which the State of Wyoming is vitally interested in a way that is in direct conflict with the decision of the Wyoming Supreme Court in the case of Hjorth Royalty Co. v. Trustees of the University, 30 Wyo. 309. In this case the Wyoming Supreme Court holds that "a suit against a department of state government or a board or corporation created by the state for governmental purposes is a suit against the state."

VI.

Because the decision of the Circuit Court of Appeals is self-contradictory in that it reverses its previous decision in the case of Read, Insurance Commissioner, v. National Equity Life Insurance Co., 114 Fed. (2d) 977.

VII.

Because the decision of said Circuit Court of Appeals would require the United States District Court for the District of Wyoming to take jurisdiction of a case and to try an action against a nominal defendant where the State of Wyoming is the real party in interest.

VIII.

In addition to the above grounds, your petitioners would also respectfully call the attention of this Honorable Court to the fact that respondent's petition does not pray for any judgment against your petitioners.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the case therein entitled:

"No. 2240
"The Mitchell Irrigation District, a corporation, appellant,
vs.
"Seymour S. Sharp, Superintendent of Water Division No. 1, State of Wyoming, and John A. Whiting, Jr., Water Commissioner, District No. 14, Division No. 1, of the State of Wyoming, appellees."

to the end that said case may be reviewed and determined by this Court as provided in Section 240 of the Judicial Code, as amended by the Act of Congress of February 13, 1925, providing for certiorari to circuit courts of appeal; and that your petitioners may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity to said Act, and that the said judgment of said Circuit Court of Appeal in said case, and every part thereof, may be reversed by this Honorable Court, and your petitioners will ever pray.

SEYMOUR S. SHARP, Superintendent of Water Division No. 1, State of Wyoming, and JOHN A. WHITING, JR., Water Commissioner, District No. 14, Division No. 1, State of Wyoming.

By EWING T. KERR
Attorney General

HAROLD I. BACHELLER
Deputy Attorney General

ARTHUR KLINE
Assistant Attorney General

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THE STATE OF WYOMING )
)ss.
COUNTY OF LARAMIE )

I, Ewing T. Kerr, do hereby certify that I have carefully examined the foregoing petition for a writ of certiorari and the allegations thereof are true, as I verily believe, and in my opinion the petition is well founded and the case is one in which the prayer of the petition should be granted by this court.

EWING T. KERR
Counsel for Petitioners.

Subscribed and sworn to before me this 27th day of August, A. D. 1941.

RUBY B. SALYER
Notary Public.

My commission expires March 25, 1943.